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Jakob Zollmann

Austrägalgerichtsbarkeit – Interstate Dispute Settlement in a Confederate Arrangement, 1815 to 1866

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Abstract

This article analyses the interstate dispute settlement mechanisms between member states of the German Confederation (*Deutscher Bund*). The question as to how disputes between German sovereigns should be decided already had a long (pre-)history dating back to the Middle Ages. Article 11 IV of the German Federal Act (1815) (*Bundesakte*) was the basic norm of the so-called *Austrägal* jurisdiction enacted to resolve disputes between states of the German Confederation and stipulated the manner in which the dispute was to be brought to ›court‹ (*Austrägalinstanz*). During the period of the German Confederation, 10 out of 25 German courts of third instance handled altogether 54 *Austrägal* cases. Whereas *Austrägal* jurisdiction was no longer present in the German *Kaiserreich*, Emperor William II and the professor of public law Paul Laband attempted to resurrect the idea, but failed due to the resistance of the other German princes.

Jakob Zollmann

Austrägalgerichtsbarkeit – Interstate Dispute Settlement in a Confederate Arrangement, 1815 to 1866

Introduction

The laws and court cases of past centuries are more than precursors to present legal arrangements. Legal history should include more than the analysis of alleged path dependencies that lead to the current majority views or current organisations. Instead, the question of how in previous centuries disputes between states were regulated can lead to the discovery of institutions that can hardly be described as the ›forerunners‹ of present responses to this problem.

The debate about interstate dispute settlement – the aim of which was to maintain peace and to avoid war – goes back to the Middle Ages, if not ancient Greece. Numerous are the authors who hoped for the taming and ›civilising‹ power of the law. Some of them envisioned a sort of international court of nations, where sovereigns could lay claims against each other, and where wise men would hear their case and decide strictly in accordance with the requirements of justice. The law should act as the ›sovereign of sovereigns‹. The texts of Abbé de Saint Pierre (*Union Européen*, 1712) and Immanuel Kant (*Perpetual Peace*, 1795) were influential already in their time. And there is a history not only of the *ideas* about interstate dispute settlement, but also a history of its *practice*. This history necessarily includes the sceptics of this idea too. The *politics* of interstate dispute resolution, the actions of those putting the institutions in place and their rules responsible for deciding disputes had to navigate between these hopes and concerns.

The history of the interstate dispute settlement mechanisms of the German Confederation (*Deutscher Bund*), described here in nine (very short) chapters, attest to both the hopes attached to applying the law in interstate relations and to the concerns that law could never bind sovereigns independently of their will. In a very concrete sense, the arrangements found in the early 19th century mirror what the contemporary philosopher Georg Fr. Hegel had to say about Immanuel Kant's ideas regarding (the future of) international law: »There is no judge over states, at most only a referee or mediator, and even the mediatorial function is only an accidental thing, being due to particular wills.«[1] When he wrote this in 1821, the German states were bound to a dispute settlement mechanism that was characterised by political mediation (attempts), legal procedure and – if necessary – forceful execution against an unwilling party. This is in part more than what current arrangements allow for. But even contemporaries had asked about the kind of disputes that such provisions – if at all – could be solved. In the end, they were in place for 51 years, that is, until the end of the German Confederation in 1866.

A few words about the term ›interstate dispute‹ seem appropriate: It may appear surprising to find such a term applied to an ›inner‹ German context. However, in the 18th or 19th centuries this was not unusual. Numerous German states, many of which can barely be recalled, were sovereign. A unified Germany was unheard of at that point in time. For a better understanding of the context concerning this special case of interstate dispute settlement, called *Austrägal* jurisdiction, it is therefore important to recall the degree to which German states retained their independence, understood as their status as subjects of international law, also after the Congress of Vienna (1815). Throughout most of the 19th century, states located in a political and cultural territory called Germany (*Deutschland*) by contemporaries were sovereign. They were fully

1 Hegel (2001) § 333 (»Es gibt keinen Prätor, höchstens Schiedsrichter und Vermittler zwischen Staaten, und auch diese nur zufälligerweise, d. i. nach besonderen Willen.«, Hegel (1986) [1821] § 333, 500). Unless otherwise stated, all translations into English are my own.

recognised members of the ›concert‹ of European states. Other European governments acknowledged not only the sovereignty of Prussia or Austria, but also that of smaller German states. To give but one example: The French *Annuaire Diplomatique* of 1859 listed in the first section the *Souverains de l'Europe*. It commenced with *Autriche* and *Bavière*, but Hanover, Saxony and Württemberg were also named. In a separate entry, 22 smaller *États d'Allemagne*, including all their princes, their titles and families, were documented over the course of 19 pages.[2] Still in 1865, the Hanseatic cities of Bremen, Lübeck and Hamburg concluded a treaty of commerce and navigation under international law with the French Empire.[3]

Given the German states' status as sovereign members of the »concert of Europe«, it is not altogether surprising that legal provisions regarding the dispute settlement of the German Confederation and its predecessor, the Holy Roman Empire, were analysed (or at least mentioned) by (international) lawyers when questions of international arbitration were of particular political relevance. Prior to the First World War, »arbitration« had become »the catchword of the day«.[4] Its pacifist advocates sought historical arguments to support their hopes for »peace through law«. In an overview article on the »formation of international law«, Ernest Nys, a member of the *Institut de Droit International* since 1892 and later on the list of Belgian members of the Permanent Court of Arbitration, referred approvingly to the German Empire's *Austrägal* jurisdiction that he laid out in some detail. Reference was also made to historic *Austrägal* courts in the *American Journal of International Law*, when the recent history of the Hague International Court of Arbitration was analysed.[5] The (encouraging) argument supported by these historic descriptions was most of all *that* interstate dispute settlement is possible and has been possible by recourse to law. Why this was (or was not) possible is the subject matter of the pages that follow.

1 Historical Background. Principles of the German Confederation (*Deutscher Bund*)

Considering the partition of Poland in 1795, historian Manfred Botzenhard spoke of a »prelude to the unscrupulous power politics of the great [powers] at the expense of small ones, which should characterise the style of European politics in the following decades«. In 1803, the *Reichsdeputationshauptschluss* (Law on the ›final recess of the Extraordinary Imperial Delegation‹) secularised in the Holy Roman Empire around 70 ecclesiastical states and abolished 45 imperial cities to compensate German princes for territories to the west of the river Rhine that had been annexed by France. This, along with the mediatisations from 1806 to 1814 that transferred the sovereignty of smaller states within Germany to their larger neighbours and other annexations, proved this »power politics … at the expense of small ones«. In contrast, in its defining texts, the post-Napoleonic order established at the Congress of Vienna spoke a different language. In the Peace Treaty of Paris (30 May 1814), the allied governments had already agreed on the future of the German principalities: »Article VI. Les États de l'Allemagne seront indépendants et unis par un lien fédératif.« On the surface it appeared as if the negotiations in Vienna in 1815 had established a consensus that the relations between European and, in particular between the German states should be based on mechanisms of negotiation and balance amongst equals. For the representatives of the German power houses of the day, Austria and Prussia, durable stability within the purview of the former Holy Roman Empire was to be realistically achieved in the form of a »federal state« (*föderativer Bundesstaat*). However, the negotiations in Vienna clearly showed the danger that Austria and Prussia could very well use a federal constitution to undermine the sovereignty of medium- and small-sized German states agreed on in Paris. In the end, the latter's »fierce resistance against the [Austro-Prussian] constitutional politics was … completely successful«.[6] In-

2 Annuaire Diplomatique de l'Empire Français pour l'année 1859.
3 Richefort (2006).
4 Riemens (2010) 81.
5 Nys (1912) 302 f.; Myers (1914) 800.
6 All quotations Botzenhart (1985) 9, 83.

stead, the German Confederation (*Deutsche Bund*) was constituted as an indissoluble alliance of 39 »equal and sovereign states« that was, a few years later, legally defined as an »association under international law« (*völkerrechtlicher Verein*) (Article 1 *Wiener Schlussakte* 1820 [hereinafter WSA]).[7]

The constitutional arrangements of the German Confederation were set down in a number of covenants, the most important of which was the Federal Act (*Bundesakte*) of 8 June 1815 – also described as the German »basic law« (*der Grundvertrag und das erste Grundgesetz dieses [völkerrechtlichen] Vereins*, Art. III WSA). As part of the Vienna Congress Act (Articles 53 to 64), the *Bundesakte* was also an international treaty signed and guaranteed by all the major European powers. However, it described the political and legal structure of the Confederation »only in the most important elementary features«. In subsequent years a number of special resolutions of ministerial conferences or the Federal Convention (*Bundesversammlung* or *Bundestag*) in Frankfurt / Main – a permanent congress of instruction-bound envoys of their 39 German principalities (including one representative of the four free cities: Frankfurt / Main, Bremen, Hamburg, Lübeck) – detailed the structure of the confederation. Among the most relevant were several acts on the Confederation's military constitution[8] as well as acts on the judicial settlement of disputes between member states.

The independent member states committed themselves to collectively maintaining their foreign and domestic security. They were entitled to conclude treaties under international law, but were not permitted to conclude treaties against the confederation or its individual members, let alone to wage war against each other (Article 11 III Federal Act). However, they were free with regard to their domestic policies, unless the Federal Convention unanimously approved a decision affecting domestic politics.[9]

Whereas the previous decades had been dominated by war and power politics that had seen »the small« suffering at the hands of »the large« states, the political as well as the legal order of the German Confederation was consciously focused on the preservation of the status quo as agreed in 1815. In the Federal Convention this resulted in a jealous safeguarding of the independence and sovereignty of all member states, be they small or large. But beneath the surface more was happening; there were activities pointing toward a changing zeitgeist. Three months after signing the *Bundesakte* in Vienna, the rulers of Russia, Austria and Prussia founded in Paris the Holy Alliance. Tsar Alexander, the *spiritus rector* of the Alliance, was influenced by German pietism when he formulated his ideas of a Christian alliance safeguarding not only peace, but the religious, moral and political order of Europe's monarchies against revolutions. In Paris, he and the two most prominent princes of the German Confederation promised each other to act on the basis of »justice, love and peace«, both in domestic and foreign affairs, for the purpose of »consolidating human institutions and remedying their imperfections«.[10]

It might be easy to identify the »remedying« of human »imperfections« with the »police state« erected in the spirit of the Holy Alliance's struggle against nationalists and other revolutionaries under the auspices of the German Confederation. Indeed, the first federal institution set up after 1815 was the political police.[11] Yet, this concern for (political) unrest did not merely dominate policies

7 Eichhorn (1833) 1; Scheuner (1976) 20, 22.
Art. I. WSA »Der deutsche Bund ist ein völkerrechtlicher Verein der deutschen souverainen Fürsten und freien Städte, zur Bewahrung der Unabhängigkeit und Unverletzbarkeit ihrer im Bunde begriffenen Staaten, und zur Erhaltung der innern und äußern Sicherheit Deutschlands.«
Art. II. WSA »Dieser Verein besteht in seinem Innern als eine Gemeinschaft selbständiger, unter sich unabhängiger Staaten, mit wechselseitigen gleichen Vertrags-Rechten und Vertrags-Obliegenheiten, in seinen äußern Verhältnissen aber, als eine in politischer Einheit verbundene Gesammt-Macht.«
I will abstain here from detailing the history of the concept of »confederation« (*Staatenbund*), but will merely refer to Samuel Pufendorf; for a more contemporary contextualisation of Pufendorf cf. Preuss (1889) 11–17.

8 Angelow (1996).

9 Bauer (1992) 32; Botzenhart (1985) 16.

10 Rey (2009) 358 f.; Menger (2009); Ghervas (2008); Bourquin (1954).

11 Botzenhart (1985) 90. After the Carlsbad decrees (1819), the »Investigation Law« prompted the establishment of a central state police agency – the central investigative commission – which was situated in the federal fortress of Mainz until 1828. This commission was authorised to seek out and pursue »revolutionary activities« directed at either the federal government or individual states therein.

within the member states of the Confederation. Until 1848, the basic principle of the ›Metternich system‹ was shaped by the conviction that all European states had an overriding common interest in maintaining peace, law and order as well as in preserving external and internal stability and security. It was thus a moral and legal obligation to protect this order under the principles of solidarity and reciprocity.[12] The independence of the European states was best guaranteed by a system of equilibrium committed to these principles; this system would be able to balance the dynamics of power politics and would protect the small states from the preponderance of large states.[13] Furthermore, there was an indisputable inward looking tendency among German governments. After years of upheaval and dramatic impoverishment of the populace, the reconstruction of social peace within the states was given greater importance than the restoration of international political dominance. In their writings several conservative exponents of the *Vormärz* exhibited political thinking moving in a similar direction. They were hostile to any thoughts about the nation state, since it opposed the principle of an assumed universal (European monarchical) legal and moral system (as implied by the Holy Alliance); this is a conception at odds with the principle of national egotism, which threatened to embroil the states in constant struggles for their individual interests, prestige power and dominance.[14]

One might assume that this thinking in terms of international balance (for Metternich this meant primarily the prevention of revolutions) may have led to policies that granted little prominence to reconciling opposing interests between members of the Confederation by legal means. No doubt, considering the alleged fundamental convergence of all the sovereigns' interests, disputes were seen as regrettable exceptions, rather than as part of legitimate political behaviour. However, the years and decades following the Vienna Congress saw a steady engagement of high politics with questions of legal dispute settlement between states of the German Confederation. Too many convoluted legal issues haunted state administrations across German borders, too much money and honour was at stake to leave all the underlying questions to be resolved by means of diplomatic negotiation. Therefore, matters of (federal) court procedures, applicable law and justiciability remained on the agenda of the German Federal Convention.

2 Legal Dispute Mechanisms between German States. A Short Overview

By the time the Congress of Vienna took place, the question of how disputes between German sovereigns should be decided already had a long and controversial (pre-) history dating back to the Middle Ages. Since at least the 14th century, princes had enjoyed the privilege of seeking justice among their peers who were *ad hoc* appointed to sit as arbitrators in case a dispute arose between two or more holders of such privileges. This *ius austraegarum* (probably a Latinised form of the German verb »austragen«, referring to settling a dispute[15]) was thus related to what German constitutional historians call the *Standesgerichtsbarkeit* among the German nobility (loosely translated »trial by peers«). The rules of the Imperial Chamber Court (*Reichskammergericht*), which had been the Holy Roman Empire's highest court since 1495 (together with the Aulic Court [*Reichshofrat*] in Vienna) explicitly acknowledged the right of the German princes and other »immediate« barons (*Freiherren*) to the so-called *Austräge* (*Recht der Austräge*).[16] The Peace of Westphalia (1648), again, guaranteed these privileges, which included the settlement of disputes that would be – in modern terms – characterised as civil and constitutional matters. While in civil actions the *Austrägal* jurisdiction was losing influence to ordinary courts, during the 18th century constitutional cases, understood as legal questions of high political relevance between two princes, continued to be handled between peers, that is, a third German sovereign.[17]

12 Hardtwig (1985) 33–39.
13 Botzenhart (1985) 86.
14 Botzenhart (1985) 131.
15 Leonhardi (1838) 13–15; Grimm: Deutsches Wörterbuch (1853), Bd. 1, Sp. 1001, Art. »austrag«; Betz (2007) 4–7.
16 Zachariä (1845) 298 f.; Diestelkamp (1994); Diestelkamp (2013); cf. for an overview in English Nys (1912) 302.
17 Hinkel (1984) 26 f.

It was in this latter sense that dispute mechanisms between the German states were discussed as *Austrägalinstanzen* during and following the Napoleonic era. In Article 9 of the Act establishing the Confederated States of the Rhine (*Rheinbund; États confédérés du Rhin*, 12 July 1806), a union of client states to the French Empire under Napoleon I, the *Bundestag* (*Diète*, an assembly of the Princes) in Frankfurt was identified as the institution that should resolve conflicts between member states.[18] In 1814/5, Prussia, Austria and a number of smaller states even tabled different designs for a permanent ordinary federal court that should decide on disputes between German states. As they understood it, the future German Confederation, while aiming to maintain internal security, should also provide for a regulated system of legal dispute settlement between members of the confederation. In February 1815, a representative of Prussia declared, »that as long as the federal constitution lacks a federal court, one will never be able to reverse the conviction that the structure of Germany lacks the last and most necessary keystone«.[19]

However, representatives of Bavaria, Württemberg and the Grand Duchy of Hesse – adherents of the strong (southern) German particularism – were worried about the impediment of their sovereignty by strong federal institutions.[20] They argued that the German Confederation was a confederation and not a federal state. Considering the sovereignty of individual members, it would thus be legally impossible to transfer a general jurisdiction over all its members to the Confederation. Instead, the Federal Convention would have to authorise for each individual case one of the highest regional courts of member states to deliver an award for individual disputes; this court would act »on behalf of« the Confederations highest decision-making body. This proposal, therefore, did not follow in the tradition of the *Reichskammergericht* (abolished in 1806) as the central and highest German court authority. Instead of a specific institution, the southern German states insisted on their absolute judicial sovereignty and advocated a non-centralised solution. They pointed to the ›older‹ tradition of settling disputes between German sovereigns, i. e. the *Austrägal* jurisdiction by *ad hoc* chosen arbitration bodies. In order not to jeopardise the conclusion of the Federal Act in its entirety, Bavaria, Prussia and other proponents of an ordinary federal court agreed in the future to set up an *Austrägalinstanz* in each individual case.

A sort of federal supervision of the state jurisdictions can be read into Article 12 of the Federal Act (1815) by assigning the smaller member states to set-up high courts (meaning courts of third instance). A few years later Article 29 of the Vienna Final Act (1820) empowered the Federal Convention in Frankfurt / Main to step-in on behalf of individuals against obstructions of justice in any member state.[21] Thus, the Federal Convention, which was to remain the only permanent institution of the German Confederation, possessed – in addition to its legislative and executive – judicial powers.[22] It was in general responsible for the settlement of disputes within the German Confederation, be it between member states, between state governments / the monarch and their legislatures or (to a limited extent) between individuals and member states. In the German Confederation, not only governments of the member states possessed special rights in terms of dispute settlement. Also within member states there were categories of (natural or legal) persons who were »exempted«

18 »Art. IX. Toutes les contestations qui s'élèveront entre les États confédérés seront décidées par la Diète de Francfort«.

19 »daß, solange es der Bundesverfassung an einem Bundesgerichte fehlt, man nie wird die Überzeugung aufheben können, daß dem Gebäude in Deutschland der letzte und nothwendigste Schlußstein fehle«, cit. in: Dr. von Linde, Entwurf des Vortrages des Bundestags-Ausschusses eines Bundesgerichtes, vorgelegt 23.1.1860, Sächsisches Hauptstaatsarchiv, Dresden (SHStA) 10718, Nr. 17, Bl. 11; cf. Klüber (1816) 17.

20 Bönnemann (2007) 24 f.

21 Article 29 WSA (1820) »Wenn in einem Bundesstaate der Fall einer Justiz-Verweigerung eintritt, und auf gesetzlichen Wegen ausreichende Hülfe nicht erlangt werden kann, so liegt der Bundesversammlung ob, erwiesene, nach der Verfassung und den bestehenden Gesetzen jedes Landes zu beurtheilende Beschwerden über verweigerte oder gehemmte Rechtspflege anzunehmen, und darauf die gerichtliche Hülfe bei der Bundesregierung, die zu der Beschwerde Anlaß gegeben hat, zu bewirken.« Cf. Klüber (1822) 236 reasoning: »denn der oberste Grundsatz des Bundes ist, daß unter allen Bundesgliedern und in allen Bundesstaaten kein anderer als ein rechtlicher Zustand bestehen müsse«; cf. Scheuner (1976) 26 f.

22 Leonhardi (1838) 91 f.; Grimm (1988) 67.

from ordinary courts, most of them belonging to different classes of nobility like the landed gentry; the latter often kept their rights to patrimonial courts until (or after) the Revolution of 1848/49.[23]

Although the German Confederation was neither a legal successor to the Holy Roman Empire, nor to the Confederated States of the Rhine, legal positions (*Rechtsverhältnisse*) established in these periods also continued after 1814, unless they were expressly declared to be revoked. The continued validity of previously founded legal positions was of major importance for the *Austrägal* jurisdiction, since many disputes brought before the *Austrägal* courts were related to questions about these legal positions.[24]

3 »Not to Wage War against Each Other«. The Laws of the *Austrägal* Procedures, 1815–1866

Within five years after a compromise on the question of German interstate dispute settlement was found in Vienna, the procedural details of the *Austrägal* jurisdiction were finalised. In fact, the Hesse councillor Friedrich Wilhelm von Leonhardi argued in his magisterial treatise on the *Austrägal* jurisdiction (1838) that the »German Confederation is still too recent (*neu*), in order to feature already a complete constitutional law«.[25] But the provision regarding the German interstate dispute settlement in place then remained unaltered until the dissolution of the German Confederation following the Austro-Prussian war in 1866.

The basic norm of the *Austrägal* jurisdiction was Article 11 IV of the German Federal Act (1815), decreeing:

> »The Federal Members … undertake not to wage war against each other under any pretext, or to settle their conflicts by force, but to refer them to the Federal Convention. By a committee, the latter is thereupon obliged to attempt to mediate; should this attempt fail, and thus a judicial decision become necessary, [the Federal Convention] would have to effect it through a well-ordered *Austrägal* instance to whose award the disputing parties have to submit immediately.«[26]

Article 11, in its prohibition of war between German states, explicitly juxtaposed the use of force and the recourse to judicial settlement. However, the future constitutional and political development would show that the two had to be seen rather in conjunction. In order to regulate the details of the »well-ordered *Austrägal* instance« and to give legal substance to the Federal Act, the Federal Convention enacted three key laws: the *Austrägal* Decree (*Austrägalordnung* [AO], June 16, 1817), the Vienna Final Act (*Wiener Schlussakte* [WSA], May 15, 1820)[27] and the Federal War Constitution (*Bundeskriegsverfassung*, April 9; April 12, 1821[28]). During the negotiations leading to the *Austrägal* Decree, the regret was repeatedly put on record that in 1815 no agreement concerning a permanent federal court had been achieved. Article 3 AO consequently emphasised that the »proposal for setting up a permanent *Austrägal* commission … is not considered abandoned«; instead, this »first proposition« would be reviewed again, after having acquired more experience, at a later date. In 1819/20, during the Vienna Ministerial Conferences, proposals towards a federal court were again discussed. However, due to the continuing concerns of some members of the Confederation that such an institute would constrain their sovereignty, no agreement in this respect was concluded.[29]

The detailed procedural steps, as provided for in the *Austrägal* Decree (AO), can be summarised as follows: According to Articles 1 and 2 AO, and in accordance with the Federal Act, the interstate

23 Wienfort (1994).
24 Frühauf (1976) 78.
25 Leonhardi (1838) viii.
26 Artikel 11 IV Bundesacte: »Die Bundes-Glieder machen sich … verbindlich, einander unter keinerley Vorwand zu bekriegen, noch ihre Streitigkeiten mit Gewalt zu verfolgen, sondern sie bey der Bundesversammlung anzubringen. Dieser liegt alsdann ob, die Vermittlung durch einen Ausschuß zu versuchen; falls dieser Versuch fehlschlagen sollte, und demnach eine richterliche Entscheidung nothwendig würde, solche durch eine wohlgeordnete Austrägal Instanz zu bewirken, deren Ausspruch die streitenden Theile sich sofort zu unterwerfen haben.«
27 Austrägalordnung (June 16, 1817, Protokolle der Deutschen Bundesversammlung 1817, 35. Sitzung § 231, p. 468 f.); Wiener Schlussakte (May 15, 1820, Protokolle der Deutschen Bundesversammlung 1820, 11. Sitzung, p. 13 f.); Exekutionsordnung (August 3, 1820, Protokolle der Bundesversammlung 1820, p. 222 f.); cf. Klüber (1822) 249.
28 Angelow (1996).
29 Frühauf (1976) 84.

dispute had to be submitted for mediation to the Federal Convention first. Article 3 Nr. 1–11 AO stipulated that within four to six weeks after the failure of the mediation was announced to the Federal Convention, the defendant had to propose to the claimant three »neutral« members of the German Confederation from which the latter had to choose one. The court of third instance (*die dritte oberste Justizstelle*) of the chosen member state was then considered the *Austrägal* court.[30] In settling the dispute between the member states, the court acted on behalf of (*im Namen und anstatt*) the Federal Convention, which had to provide the former with the facts of the previous mediation attempts. The chosen court had a »federal duty« to take over the case, which was to be handled according to the court's ordinary rules of procedure. As to the question of the substantive law to be applied, the *Austrägal* Decree remained as general as possible and stated that the award had to be in accordance with the »ius commune customary in Germany« (*in Deutschland hergebrachten gemeinen Rechten*). The award (*Erkenntniß*) was to be given latest one year after the memorandum of the claimant was received (hardly any case was completed within this deadline). It was binding and final; remedies were rare exceptions and only permitted if the parties could provide the *Austrägal* court with new evidence (*Restitution ex capite novorum*) within four years.[31]

In 1820, the ongoing debates in ministerial conferences and at the Frankfurt Federal Convention about a more precise definition of the relation between the Confederation and its member states were concluded in the Vienna Final Act (*Wiener Schlussakte*). Among others, its 65 Articles dealt with the *Austrägal* jurisdiction and spelt it out in three different types, later analysed by legal historians as: the regular *Austrägalverfahren* (Articles 21 to 24 WSA), the special *Austrägalverfahren* (Article 30 WSA) and the summary *Austrägalverfahren* (Articles 18 to 20 WSA).

Articles 21 to 24 WSA confirmed the regular procedures set down in the AO. Article 23 WSA stipulated that, in case no special provisions are in force, the *Austrägal* court had to follow those »sources of law« as observed »subsidiarily by the former Imperial Courts« to the extent to which they may be applicable in current circumstances. It was emphasised in Article 22 WSA that once the *Austrägal* court was chosen by the parties to settle their dispute, neither the Federal Convention, nor the state government could exert any »influence« on this court. However, once the award was given, it fell to the Federal Convention to guarantee it. *In extremis* it had to execute the *Austrägal* award, like any other federal act, by force against the will of the recalcitrant member state in accordance with Articles 31–34 WSA and Articles 5 sq. Execution Decree (*Executions-Ordnung*, August 3, 1820).[32]

The summary (or provisionary) *Austrägal* procedure, according to Articles 18 to 20 WSA, was to be read in conjunction with Article 2 of the Federal Act detailing the German Confederation's purpose to uphold and protect the »independence and inviolability of the German states«. Once the »domestic peace and quiet of the Confederation« was threatened or disturbed, the Federal Convention had to deliberate and take the appropriate measures to assure the »restoration« of peace. Indirectly referring to the Federal Act's proscription of self-help, this included the Confederations right to intervene in cases of potential or existing »assaults« (*Thätlichkeiten*) between member states. One of the most interesting expressions of the zeitgeist is the provision that the Federal Convention had »above all« to ensure the »maintenance of vested rights« (*Besitzstand*) (Article 19 WSA).[33] In case the Federal Convention was called upon by a member state for the protection of its »vested rights«, and these rights were under dispute, the Convention was authorised to prompt another, disinterested member state »nearby the territory to be protected«, to have investigated the facts and the

30 No »foreign institution« could be *Austrägal-Instanz.*

31 Zachariä (1845) 312; Zoepfl (1863) 420–427.

32 Zachariä (1845) 303 f.; cf. Huber (1953/4); Scheuner (1976) 25.

33 Cf. Hardtwig (1985) 32 referring to the riots of weavers in Silesia 1844: »Jeder Angriff auf das Privateigentum galt zudem in der entstehenden bürgerlichen Erwerbsgesellschaft schlechthin als Sakrileg, das hart geahndet wurde.«; more details about Article 19 WSA can be found in: Huber, Bundesexekution: 53–55.

disturbances by its high court. Following this »summary investigation without delay«, the high court had to »issue a legal notice«. The latter's execution, if refused by the state against whom it was issued, had to be ensured by the Federal Convention by those means enumerated in the notice (Article 20 WSA). Already in 1838 Leonhardi emphasised that the summary procedure for the maintenance of peace among the federal members was inherently a police measure. It served merely the purpose of restoring peace, not to regulate legal relationships among members of the German Confederation.[34] If one of the members felt penalised by the summary procedure, it was free to seek a more advantageous (and final) decision in a regular procedure according to Article 21 WSA and Article 3 AO. However, all of this remained theory. There were in fact several federal executions and interventions conducted by the German Confederation according to Articles 19 or 26; 31–34 WSA without the prior or later involvement of courts, reaching in part European proportions.[35] Yet, no execution was related to Article 20 WSA. No *Austrägal* award was ever issued based on its provisions, thus showing that the summary procedure had only »limited practical relevance«.[36]

The *Austrägal* procedure, according to Article 30 WSA, dealt with the special case of claims by »private individuals« (also called *Diadikasie* procedure, following similar cases in ancient Greek law). They could become the basis or reason for an *Austrägal* procedure, assuming the claims were not met due to a controversy between several German states about the question as to which party was under an obligation to fulfil the private claim. In the event that they could not reach an amicable agreement to be mediated by a committee of the Federal Convention, the member states had to approach an *Austrägal* court in order to clarify the »preliminary question in dispute« concerning the capacity of a state to be sued (*Passivlegitimation*). However, determining the party roles turned out to be problematic, as – given the burden of proof – none of the state parties wanted to act as plaintiff; special provisions regarding this question were missing. Although the determination of the party roles by lot had been discussed in the legal literature to, in practice it was often the case that the *Austrägal* court called on one party by administrative decision to provide it with a first brief and thus – without any prejudice to any other rights – to accept the role of plaintiff.[37]

The distinct characteristic of the special *Austrägal* procedure was that the entire case was induced and executed in the interest of a private person, mostly commencing with a petition to the Federal Convention. Nevertheless, the private person was not party to the case. In 1822, Robert Mohl, then soon-to-be professor of law in Tübingen, assumed that considering the purpose of the German Confederation and the elaborateness of the law, the provisions on *inter-government* dispute settlement (Article 21 WSA) were »by far the most significant« of the German federal judiciary (*Justizverfassung*).[38] However, it appears that 31 out of 54 *Austrägal* procedures from 1815 to 1866 were procedures according to Article 30 WSA. The significance of this is, in part, explained by the fact that following the international reorganisations between 1806 and 1815, private creditors often did not know against whom they should direct their claims, which originated prior to the foundation of the German Confederation. The disputes underlying all these cases concerned claims (from bonds or loans) against the successors of former imperial territories, thus the main legal question was about state succession.[39] As a rule, creditors were mostly commoners, merchants or bankers. Only under exceptional circumstances did noblemen assert their claims according to Article 30 WSA, for example, with regard to pension entitlements or other capital assets that stemmed from former

34 Leonhardi (1838) 96; cf. Scheuner (1976) 24.

35 Hubatsch (1983) 42–43; Huber (1953/4) 7 f., 2 f., cases of federal intervention: 1. intervention in Luxemburg due to the Revolution in Belgium 1830/31; 2. sending federal troops to Frankfurt due to the »Wachensturm« 1833; 3. actions of the Confederation in Kurhesse and Holstein in 1850/52. Cases of federal execution: 1. occupation of Holstein by federal troops in 1864; 2. mobilisation of federal troops against Prussia in 1866; cf. also Stier-Somlo (1927); Börner (1908); Pritsch (1913).

36 Frühauf (1976) 150.

37 Klüber (1822) 256 f.; Zachariä (1845) 315; cf. Polgar (2007) 121; Frühauf (1976) 140.

38 Mohl (1822) 137.

39 Scheuner (1976) 26; Bönnemann (2007) 34; Betz (2007) I. Tabellarische Übersicht i–v, characterising 31 out of 54 cases as »Diadikasieprozesse«.

government rights of mediatised princes.[40] Once the »preliminary question« was clarified by the *Austrägal* court – for instance, which state had to what extent and in what manner to fulfil the claims of the private person – the latter could bring suit for performance (*Erfüllungsklage*) before the competent court of the member state.[41]

Beside these *Austrägal* procedures, the member states were, according to Article 24 WSA, *frey* to find – without the involvement of the Federal Convention – a »compromise«, an option that was often more expeditious. Yet, *Austrägal* courts could be involved in these cases as well. The *Oberappellationsgericht* Lübeck, for example, helped the parties in nine cases to reach a compromise about disputes often concerning titles to territories.[42] Furthermore, six out of the 54 formal *Austrägal* procedures commenced according to Article 3 AO; however, due to compromises between the state parties, they were eventually terminated, i.e. were resolved without a formal award by one of the *Austrägal* courts.[43]

In general, politicians had high hopes in the *Austrägal* jurisdiction and its influence on German law and politics. Following the publication of the *Austrägal* Decree, the Prussian Chancellor, von Hardenberg, wrote to his Minister of Justice, von Kircheisen, that the future endeavours of the highest German courts as *Austrägal-Instanz* constitute »a challenge to … all branches of jurisprudence«.[44] On the other hand, these additions to the federal »basic law« of 1815 were not particularly satisfying to those who still hoped for a genuine reform of the German Confederation and constitutional amendments that would give substance to legal questions, such as freedom of the press, parliamentary rights or trial by jury. Instead, the laws of 1819/20 pointed into the opposite direction. Most famous are the Carlsbad Decrees, which banned university fraternities (*Burschenschaften*), authorised the persecution of university professors and expanded the censorship of the press. But the Vienna Final Act and the Execution Decree also made the constitution of the German Confederation look like an »authoritarian response to oppositional challenges«. In subsequent years, oppositional circles were less and less inclined to pin their hopes on reforms of the federal constitution. Liberal critics of the current system rather focused their attention on the (southern German) Diets, venturing about challenging monarchical authority and securing individual rights against administrative encroachments. It was here, in the Diets, not in the courts, that during the 1820s the word »constitution« developed into a »polemical term«.[45]

4 In Theory. The Federal Court of Arbitration (*Bundesschiedsgericht*)

The debate about a federal high court did not disappear completely after 1820. As mentioned above, the Vienna Final Act explicitly mentioned the possibility that in the future the German states might come to an »alternative understanding« with regard to the *Austrägal* courts (Article 21 WSA). In politics as well as in academic treatises, such as in Robert Mohl's *Die öffentliche Rechtspflege des Deutschen Bundes* (1822), the »gaps … still to be filled in our current legislation« were candidly discussed.[46]

While a number of disputes between German states had already been decided by *Austrägal* courts, and others were still being negotiated in the Federal Convention, the governments ventured into finally setting up a new federal institution, a federal court (in 1819 a federal police commission had been created following the Carlsbad Decrees, the *Central-Untersuchungs-Commission*[47]). In 1834, during ministerial conferences in Vienna, a commission was formed to elaborate proposals for a federal court. However, sceptics of central institutions, again, got the upper hand and channelled

40 Frühauf (1976) 160 f.
41 Frühauf (1976) 131–134.
42 Leonhardi (1838) 91; Polgar (2007) 133; Frühauf (1976) 99 referring to the Archiv der Hansestadt Lübeck, Direktorialarchiv für die Angelegenheiten des Oberappellationsgerichts der vier Freien Städte Deutschlands, Rep. 22/2 VI B Nr. 4, 7–11, 13–15.
43 Frühauf (1976) 104.
44 Hardenberg to Kircheisen, 12/7/1817, Preuß. Geheimes Staatsarchiv, Justiz-Ministerium, Acta Generalia, Rep. 84a, 10397, Bl. 7 zit. in: Frühauf (1976) 83.
45 Geisthövel (2008) 16, 27 »polarisierende[r] Kampfbegriff«.
46 Mohl (1822) 1; cf. Eichhorn (1833) preface; Scheuner (1976) 23.
47 Siemann (1985); Weber (1970).

the proposals into the direction of an arbitration tribunal. In the resolution of 30 October 1834, the Federal Convention agreed to set up in Frankfurt / Main a Federal Court of Arbitration (*Bundesschiedsgericht*). Its remit, however, should not primarily include the settlement of disputes between governments of the German Confederation, but rather disputes (*Irrungen*) between German governments and their parliaments or assemblies of the representatives of the estates over the latter's rights to participate (especially with regard to budget appropriation).[48] Not all German states already had a constitution, and there were no (constitutional) courts that could have decided the conflicts between governments and the estates. When an increasing number of such conflicts began to dominate the political debate and, in particular given the revolutionary movements that impacted most members of the German Confederation between 1830 and 1834 (*insurrection de Francfort*, 1833), the resort to a judicial solution was considered the most convenient. Thus the ministerial conference in Vienna voted for the creation of a special »court of arbitration« (*Schiedsgericht*).[49]

However, this milestone towards a German constitutional court is also relevant for the question of interstate dispute settlement. Art. 12 of the 30 October 1834 resolution left it to the discretion of the member states to also allow the Federal Court of Arbitration to settle disputes between them. Thus the opportunity was given to the governments to settle state disputes by legal recourse, yet without the involvement of *Austrägal* courts. The latter were faced with a »real competitor«; members of the German Confederation could choose. Nonetheless, between 1834 and 1866 the Federal Court of Arbitration neither acted as a quasi-*Austrägal* court, nor did it decide on disputes between governments and estates. In this respect, the court had virtually no significance for the interstate *Austrägal* jurisdiction.[50]

The reasons for this miscalculation of the Federal Convention when setting up the court of arbitration are multifaceted. Most of all, referring a dispute to federal arbitration was not mandatory but merely optional (»*facultativ*«) for governments and estates. Both parties to the dispute had to agree to the arbitration. It follows from this that the estates were not entitled to unilaterally request federal arbitration, and state laws were never introduced that declared the general competence of the Federal Court of Arbitration (some constitutions recognised the authority of a state court [*Staatsgerichtshof*] to decide disputes about the interpretation of the constitution between government and estates).[51] Additionally, the cumbersome formation of the court of arbitration, which meant no simplification in comparison to the *Austrägal* jurisdiction according to the Vienna Final Act (1820), played a role in the court's failure to attract cases: each of the 17 members of the *Engere Rat*, the most influential council of the Federal Convention, had to choose two candidates every three years (*Triennium*), one of whom had to be an expert of the »juridical« and the other of the »administrative profession«. In case of a dispute, each party nominated from this list three arbitrators (*Spruchmänner*) out of the 34 candidates (nationals of the parties to the case were eligible only in exceptional cases). Out of the remaining 28 *Spruchmänner*, the six arbitrators then chose their chairman (*Obmann*).

The fact that the »federal arbitration remained theory«[52] is not cause for the assumption that governments avoided its inception altogether. Following the Federal Convention's resolution of

48 Grimm (1988) 116–119.

49 Hardtwig (1985) 64 speaks of a »steckengebliebene Revolution« (a stalled revolution); cf. Schlussprotokoll der Wiener Ministerial-Konferenz, 12 June 1834, Article 3–14 on the court of arbitration. »Art. 4. Um das Schiedsgericht zu bilden, ernennt jede der siebzehn Stimmen des engern Rathes der Bundesversammlung aus den von ihr repräsentirten Staaten, von drei zu drei Jahren, zwei durch Charakter und Gesinnung ausgezeichnete Männer, welche durch mehrjährigen Dienst hinlängliche Kenntnisse und Geschäftsbildung der Eine im juridischen, der Andere im administrativen Fache erprobt haben. Die erfolgten Ernennungen werden von den einzelnen Regierungen der Bundesversammlung angezeigt, und von dieser, sobald die Anzeigen von allen siebzehn Stimmen eingegangen sind, öffentlich bekannt gemacht. Eben so werden die durch freiwilligen Rücktritt, durch Krankheit oder Tod eines Spruchmannes, vor Ablauf der bestimmten Zeit eintretenden Erledigungen von den Regierungen für die noch übrige Dauer der dreijährigen Frist sofort ergänzt«; cf. Zoepfl (1863) 427–433.

50 Hubatsch (1983) 42; Frühauf (1976) 156; Bönnemann (2007) 34.

51 Zachariä (1845) 335; cf. Scheuner (1976) 4 referring to the constitutions of Saxony (Article 153, 1831) and Kurhesse (Article 120, 1852), 27.

52 Huber (1990) 624; Frühauf (1976) 154, 157; Bönnemann (2007) 34.

October 1834, the German governments rushed to inform the chancery in Frankfurt / Main about their two appointees for the posts of arbitrators. The King of Saxony, for example, had his nominations placed on record with the Federal Convention just a few days later.[53] It took the Saxon administration longer to inform the prospective arbitrators themselves, Dr. Schumann and Director von Nostitz und Jaenkendorf and their superiors in the Ministries of Justice and Finance.[54]

Even though the Federal Court of Arbitration never had to resolve a case, governments continued to appoint arbitrators throughout the epoch of the German Confederation. The nomination as German federal arbitrator was an honorary position that did not mean relocation to Frankfurt. The arbitrators, according to the provisions of 1834, were supposed to be legal experts of the highest standing. When considering a number of arbitrators and their careers, it can be assumed that for many this nomination was indeed an important step in the *cursus honorum* of German jurists in state employment: The above-mentioned Dr. Schumann, councillor in the Saxon Ministry of Justice, was promoted during his tenure as arbitrator to the position of President of the newly founded high court in Dresden (*Oberappellationsgericht*). After the end of his first *Triennium* in 1837, both the King and the government in Dresden reconfirmed Schumann for the coming term.[55] In 1836, his colleague from the »administrative profession«, von Nostitz und Jaenkendorf, had been appointed Saxon Minister of the Interior. He then resigned from his post as *Spruchmann* and was replaced by the head of district administration (*Kreisdirektor*) von Wietersheim, who in 1840 also rose to cabinet rank (Culture and Education).[56] Likewise, other German governments promoted their arbitrators to high ranking posts during or following their *Triennium*.[57]

In 1838, among the 34 arbitrators, the nobility outbalanced the commons 19 to 15. The governments overwhelmingly observed the rule that from their two nominees, one had to be an expert of the »juridical« and the other of the »administrative profession«. Among the juridical experts were merely three professors of law (1837 Thibaut for Baden and Linde for Hesse; 1841 Savigny for Prussia); the majority consisted mainly of judges of appellate courts. Governments tended to reappoint their arbitrators at the end of a *Triennium*. It was no exception that incumbents passed away as federal arbitrators. The longest serving federal arbitrator was probably the President of the k. k. Appellate Court in Prague, Baron von Heß (1835 to 1849).[58]

Since 1834, the constitution of the German Confederation was strengthened by the newly created Federal Court of Arbitration. Critics had time and again deplored that a »strong« federal jurisdiction was missing in the German political system.[59] However, the innovation of 1834 remained a notional achievement. The state governments remained united in their efforts not to bring the Court of Arbitration into existence; since both parties involved in a dispute had to consent to its competence, they found it easy to fulfil liberal demands on paper and to continue with traditional policies that upheld the »Metternich system«. After all, the same resolution that in 1834 set-up the Court of Arbitration stipulated – again – unmistakably that the separation of powers »is irreconcilable with the constitutional law of the States united in the German Confederation and cannot be employed in any German constitution«.[60] Already Article 57 WSA (1820) had set the limits for

53 Protokoll der Bundesversammlung, 42. Sitzung 4.11.1834 § 592: 1047.

54 SHStA 30363, MAAA Nr. 846: 2, Saxon MFA to Saxon MoJ; MoF, 30.11.1834.

55 SHStA 30363, MAAA Nr. 846: 11, Saxon MFA to v. Manteuffel, 7.10.1837; Resolution, 30.9.1837.

56 Protokoll der Bundesversammlung, 15. Sitzung 28.7.1836 § 216; 2. Sitzg. 21.1.1841 § 26.

57 Protokoll der Bundesversammlung, 4. Sitzung 5.5.1836 § 96.

58 Protokoll der Bundesversammlung, 8. Sitzg. 17.5.1838 § 106, Beil. 1, S. 321; 35, 6. Sitzg. 13.3.1841 § 87, Beil. 3, S. 147; 64, 6. Sitzg. 4.3.1847 § 66, Beil., S. 155.

59 Mohl (1822) 219.

60 Schlussprotokoll der Wiener Ministerial-Konferenz, June 12, 1834, Article 1 »Jede demselben [Grundprinzip des deutschen Bundes, gemäß welchem die gesammte Staatsgewalt in dem Oberhaupte des Staats vereinigt bleiben muß] widerstrebende, auf eine Theilung der Staatsgewalt abzielende Behauptung ist unvereinbar mit dem Staatsrechte der im deutschen Bunde vereinigten Staaten, und kann bei keiner deutschen Verfassung in Anwendung kommen«; cf. Hegewisch (2016).

any constitutional development: Since the German Princes were »sovereign«, the »entire state authority [*Staats-Gewalt*] must remain united in the head of state«.[61]

5 The Chosen Few. The *Austrägal* Courts

Despite its reputation as an illiberal – not to say repressive or reactionary – institution, the German Confederation is nowadays also remembered by historians for its »contribution to peace-keeping« in Europe.[62] In fact, it is impossible to assess – both in retrospect and contrary to fact – which matters of dispute might have led to the use of force between German states had there not been the *Austrägal* courts or other means of compromise. But it seems fair to assume that the dispute settlement mechanisms practised in the Federal Convention were among the more relevant means available for »peace-keeping«.

As we have seen, the course of the *Austrägal* procedure was fairly regulated. According to federal laws (Article 1 AO; Article 21 WSA), it was divided into two main parts: 1. the mediation proceedings by the Federal Convention (subdivided into introductory proceedings; election and proceedings of the mediation committee; election of the *Austrägal* court) and 2. the *Austrägal* procedure proper. Since both parties were convinced of the superiority of their legal positions, the mediation proceedings were often abbreviated in order to elect the *Austrägal* court as soon as possible by nomination of the defendant and choice of the plaintiff (Article 2 II AO). If the parties could not agree, the right of proposal went from the defendant to the Federal Convention. The court of third instance of the chosen member state was thereupon informed by the Federal Convention about the case. No *Austrägal* court ever shirked its federal duty, which was seen as an honourable task underlining the importance and reputation of the court and its judges.[63] As an organisational consequence of the federal provisions, member states that had not yet installed a court of third instance erected their *Obertribunale* or *Oberappellationsgerichte*. In some of these courts the rules of court procedure (*Gerichtsordnung*) explicitly referenced the *Austrägal* competences according to federal law. Since 1838 the larger appellate courts, having several senates (Celle, Munich, Vienna), set-up special *Austrägalsenate* with at least 13 judges; previously, the courts followed the rule that they had to sit in full court (*in pleno*) for *Austrägal* cases. Despite changes to the procedural rules, the Appellate Court Celle (having three *Austrägalsenate*) complained about an overload of work due to its *Austrägal* jurisdiction. From the merely seven members of the *Oberappellationsgericht* Lübeck, such complaints were never mentioned. In addition to their ordinary court cases, both courts handled the bulk of all *Austrägal* cases (Celle 14 cases, Lübeck 6). Between 1815 and 1866, 10 out of 19 (or later 25) German courts of third instance handled altogether 54 *Austrägal* cases.[64]

In retrospect, is difficult to assess why nine out of 19 courts of third instance were never chosen by the parties to act as their *Austrägal* court. Six further courts were only elected once, while merely four courts handled more than one case (Celle, Lübeck, Jena and Mannheim). The reputation of the courts, as difficult as this is to measure, seems to be one of the main causes of this imbalance. The *Oberappellationsgericht* Celle, created in 1711 and thus one of the oldest state appellate courts in the Holy Roman Empire, was held in high esteem for its well-founded decisions. Until 1848, the judges, who were divided into one »noble« and one »commoner bar«, had to pass special entrance exams. The personal union of Hanover (a German »mid-

61 Article 57 WSA »Da der deutsche Bund, mit Ausnahme der freien Städte, aus souverainen Fürsten besteht, so muß dem hierdurch gegebenen Grundbegriffe zufolge die gesammte Staats-Gewalt in dem Oberhaupte des Staats vereinigt bleiben, und der Souverain kann durch eine landständische Verfassung nur in der Ausübung bestimmter Rechte an die Mitwirkung der Stände gebunden werden.«; cf. Welsing (2016).

62 Müller (2006) 53 f.

63 Frühauf (1976) 107; Zachariä (1845) 306.

64 Courts of third instance in the German Confederation giving an *Austrägal* award: Oberappellationsgericht in Celle für das Königreich Hannover (14 awards); Oberappellationsgericht in Lübeck für die vier Freien Städte (6 awards); Oberappellationsgericht in Jena für die Thüringischen Staaten (5 awards); Oberhofgericht in Mannheim für Baden (4 awards); Oberster Gerichtshof in Wien für Österreich (1 award); Geheimes Obertribunal in Berlin für Preußen (1 award); Oberappellationsgericht in München für Bayern (1 award); Oberappellationsgericht in Dresden (1 award); Obertribunal in Stuttgart für Würtemberg (1 award); Oberappellationsgericht in Darmstadt für Hessen-Darmstadt (1 award); Frühauf (1976) 88 f. refers to the *Oberappellationsgericht* Lübeck.

dle-state« with no aspirations for predominance) with Great Britain was apparently an indicator for the independence of the judiciary and respect for the law, both enshrined in a pioneering *Oberappellations-Gerichts-Ordnung*.[65] Furthermore, the successful handling of early *Austrägal* cases suggested to subsequent parties (or instead the Federal Convention) that in Celle their case would be in verifiably competent hands.[66] The *Oberappellationsgericht* Lübeck did not have the ›historical‹ argument at its disposal. Founded only in 1820 as the highest appellate court for the four German »Republics«, the free cities Hamburg, Lübeck, Bremen and Frankfurt / Main, it was first chosen to serve as an *Austrägal* court in 1827. The »popularity« of this court, emphasised by several legal historians, was most of all due to its »outstanding judgements«. The judges in Lübeck (as well as those in Celle or Jena) were considered to be among the most capable jurists in Germany; academic authorities, such as Windscheid, Jhering or Savigny, confirmed this time and again. The relatively speedy course of the cases (on average a duration of three years in Lübeck compared to almost 10 years in Celle) also spoke in favour of the judges in Lübeck. Moreover, the republican constitution of the Lübeck court circuit contributed a sense of judicial independence among prospective parties.[67]

Taken together, the fact that around 80 per cent of the *Austrägal* awards were given by only four courts out of potentially 19 (or 25) had – if not a unifying influence – a diminishing effect on tendencies of inconsistent adjudication between the courts. Lacking a permanent *Austrägal* institution or central federal court and given the courts' different rules of procedures, the risk of discrepancies between awards was real, since rules of procedure could influence the interpretation of substantive law. Thus, the development of a unified set of ›*Austrägal*-case-law‹ rules was – for the time being – nothing more than a mere idea. The age of legal periodicals was only beginning,[68] and it was thus not always clear whether the different *Austrägal* judges took note of previous awards by other *Austrägal* courts. Therefore, questions about the predictability of legal decisions could be realistically answered only for individual *Austrägal* courts, not for the German *Austrägal* jurisdiction in general. However, it is said that *Austrägal* awards inconsistent with one another or differing legal interpretation were »very rare«. Such inconsistencies could not diminish the authority of the courts and the »trust placed in them« to adjudicate justly.[69]

The question according to what laws *Austrägal* awards should be given, is not necessarily related to ›cultural differences‹ between parties that sometimes play an important role in international arbitration cases. After all, Article 3 Nr. 7 AO stipulated that the award had to be in accordance with the »ius commune customary in Germany« (*in Deutschland hergebrachten gemeinen Rechten*). However, the question was relevant enough for conflicting parties to choose (or not to choose) a specific court according to the procedural or substantive law it applied. For example, the Berlin *Rheinische Revisions- und Kassationshof*, which since 1819 served as the court of third instance for disputes in Prussia's territories east of the River Rhine (where after 1815 French-Rhenanian law was also applied),[70] was considered by most member states as ineligible. Prussia's Foreign Minister knew that these concerns would only give way once it was made clear that the *Rheinische Revisions- und Kassationshof* would decide *Austrägal* cases according to German common law and would disregard the French-Rhenanian court rules.[71]

6 Can the *Austrägal* Court Decide? On the Justiciability of Political Questions

The question what matters of ›state life‹, sovereignty or politics could and should be settled by court procedure is an ancient one. German legal history provides ample examples not only of discussions about this question, but also of concrete

65 Hagemann (1819).
66 Landwehr (2011) 24; Stein (1950) 63 f.
67 Polgar (2007)15, 17, 97; Frühauf (1976) 116, 161.
68 Cf. Stolleis / Simon (2006); Stolleis (1999).
69 Frühauf (1976) 161; cf. Klüber (1822) 253.
70 Seynsche (2003); Geyer (2009); Zachariä (1845) 309 f.
71 Frühauf (1976) 93.

legal cases that dealt with fundamental questions concerning the political order. Going back to the Middle Ages, the legal historian Heinrich Mitteis had already christened this phenomenon ›*Politische Prozesse*‹ back in 1927 and regarded these as the early roots of constitutional jurisdiction.[72]

The ›old‹ Imperial *Austrägal* jurisdiction was recurrently faced with the problem of defining limits between political and legal disputes. This distinction was also made during the negotiations concerning the Federal Act in Vienna. When discussing a future federal court, Prussia's commissioner explained that its competence would include only »legal questions« (*Rechtsfragen*), whereas the Federal Convention should decide on issues not related to legal questions. Two years later, the state representatives in Frankfurt preparing the *Austrägal* Decree (1817) were aware of the definitional challenges of – to use a modern term – justiciability. Prussia, but also Hesse, suggested that not all disputes referred to the Federal Convention according to Article 11 Federal Act would be suitable for an *Austrägal* court. Others, especially those who were eager to avoid a future central Federal Court, tried to argue against a special provision for »political questions«. They emphasised that it would be impossible for the Federal Convention to make such distinctions. The Saxon envoy underlined that all disputes could be brought before an *Austrägal* court since legal and political matters were too closely intertwined to clearly separate them or to determine which of the two would outbalance the other. Moreover, the envoy of Baden focused on the practicability-argument, pointing out that a »new distinction« would cause great difficulties for the Federal Convention: »It is an invidious task … to find the limit« (*Gränzscheide*). Even though the differentiation between legal questions suitable for court decisions – in contrast to matters to be left for political negotiations and mediation – did not find its way into the decree's text, the question remained relevant for German interstate disputes.[73]

Among academic jurists, questions about the justiciability of political disputes developed into one of »the most extensively dealt with problems of the judiciary of the German Confederation«.[74] Contemporary constitutional jurisprudence inquired as to whom the competence belonged primarily when settling disputes between members of the Confederation, to the Federal Convention or to the *Austrägal* courts? While some academic jurists attempted to delimit disputes based on their causes, in the end they were unable to generate more clarity than their counterparts in politics or administration. Disputes between members of the Confederation to be settled according to Article 11 of the Federal Act were differentiated into »matters of law« (*Justizsachen*) and »non-matters of law« (*Nichtjustizsachen*). Others, such as the above quoted Friedrich Wilhelm von Leonhardi, asked whether federal members were in dispute about rights and obligations originating in the Federal Act as a German quasi-constitution, or whether they opposed each other as sovereigns – without regard to the federal constitution. However, Leonhardi emphasised that »currently« federal law did not distinguish the »nature« of disputes, rather it included all disagreements »(be they law, politics, or interest [related disputes]), as long as they relate to the infringement of rights« (*verletzte Rechte*).[75] August Wilhelm Heffter, professor of law at the University of Berlin, distinguished between disputes based on the federal constitution and those pitting two or more sovereigns against each other. For them, it followed that in the first case, the Federal Convention should be exclusively in charge of the dispute settlement. According to the federal constitution, it was the highest ranking body representing the »common will of the Confederation« (*Bundesgesamtwillen*) that should also decide the dispute. If, however, the dispute was not related to rights or obligations originating in the constitution and all attempts at mediation failed, an *Austrägal* court was to be called upon. The state parties to such disputes, more or less, resembled

72 Mitteis (1927); cf. Enzmann (2009) 102.

73 Cf. Eichhorn (1833) 8, 17, 21; Bundesversammlung, Protokoll 29.5.1817 § 196: 80, cf. Bönnemann (2007) 31.

74 Frühauf (1976) 95 f.; cf. Huber (1990) 628; Betz (2007) 62.

75 Leonhardi (1838) 92, 95; cf. also Zachariä (1845) 291; 294 rejecting the distinction between »disputes in rights and disputes in interests (*zwischen Rechts- und Interessen-Streitigkeiten der Bundesglieder*)« and doubting the possibility of drawing a line (»*Gränzlinie*«) between legal and political disputes; cf. Klüber (1822) 247; 250 FN a.

parties in a civil procedure arguing in front of an ordinary court. Cases regarding claims of German princes against each other based on international law, claims of one German sovereign against the territories or properties of another or purely private claims of a sovereign (e. g. due to insults) were given as examples for such disputes »independent of the Confederation«.[76]

However, the majority of authors followed Leonhardi's understanding that the law did not distinguish between political and legal disputes amongst German governments. From this it followed that in *every* case – after mediation failed – an *Austrägal* court had to be set-up. Justiciability was not a matter of choice for the state parties. Until the very end of the German Confederation, this opinion was justified by reference to the text of Article 11 of the Federal Act (»and thus a judicial decision becomes necessary«), and the function of the *Austrägal* jurisdiction as surrogate of the German Federal Court declined during the Vienna Congress.[77] Without questioning the sovereignty of the members of the Confederation, when in doubt, these authors gave priority to maintaining peace among the German states by court decisions. Legal historian Ernst Rudolf Huber recognised that the »guarantee of peace [the purpose of the Confederation according to the Federal Act] stood higher than the guarantee of sovereignty«.[78]

Soon after the debates in Vienna and Frankfurt, the justiciability of disputes between members of the German Confederation became practically relevant during a dispute between Anhalt-Köthen and Prussia. From 1820 onwards both governments disagreed about the transit and consumption tax levied by Prussia along the River Elbe. The Prussian government stayed faithful to its argumentation in Vienna that not all disputes between member states could be decided by means of the courts. In these cases the Federal Convention should limit its efforts to mediation. There were rights, e.g. private claims of states against each other, or political interests, e.g. disputes about administrative or constitutional competences, which could – if at all – only be determined according to domestic state or international law and had nothing to do with *Austrägal* jurisdiction. While Prussia maintained that only mediation attempts should be permitted, the majority in the Federal Convention pointed out that, according to the provisions of the Federal Act, *all* disputes between federal members must be resolved by judicial decision if mediation failed. They, thus, also insisted that maintaining peace among member states by means of legal dispute settlement had priority over Prussia's claims to sovereignty. Even though Prussia's representative could not convince his colleagues in the Federal Convention, Prussia nevertheless got what it wanted: the dispute with Anhalt-Köthen never reached an *Austrägal* court, but was settled in 1828 between the parties by means of a compromise arranged by the Federal Convention. As we have seen, even the majority of legal literature argued against Prussia's stand. Still, in 1830, Prussia raised similar arguments by distinguishing between political interests and legal questions during a dispute between Braunschweig and Lippe. This time the Federal Convention referred the matter to an *Austrägal* court.[79]

However, there were indeed decisions of the Federal Convention according to which the *Austrägal* jurisdiction was incompetent to decide, irrespective of the fact that two German states were in dispute and one party asked for settlement. In a dispute between Kurhesse (Hesse Kassel) and Waldeck, the government of Kurhesse claimed the continuing liege lordship (*Lehnsherrlichkeit*) over the principality of Waldeck. On 20 January 1848, the Federal Convention rejected Waldeck's request for an *Austrägal* procedure, »because the subject of the dispute touches upon the foundation of the constitution of the German Confederation and, therefore, a court cannot be competent« (*unterfalle nicht der Zuständigkeit*).[80]

In general, *Austrägal* courts had – once charged by the Federal Convention to settle the interstate dispute – no reason to doubt their own competence to decide the case. However, this did not stop

76 Heffter (1829) 182.

77 Zoepfl (1863) 408–410; cf. Betz (2007) 62; Bönnemann (2007) 41, referring to Arnold: 6; Brunquell I: 303 ff.; Heffter: 184 f.; Maurenbrecher: 187 f.; Zachariae II: 736 f.; Eichhorn: 12.

78 Huber (1990) 629; Frühauf (1976) 97.

79 Frühauf (1976) 97; Bönnemann (2007) 30.

80 Protokolle der Bundesversammlung 1848 III § 43: 70, cf. Zoepfl (1863) 418 f.; Frühauf (1976) 117.

the parties from repeatedly arguing in their memoranda and during the hearings that the court lacked competence. Yet, each time their objection was rejected.[81]

7 How? And How Relevant? The Practice of German *Austrägal* Jurisdiction

How did the parties organise their *Austrägal* cases? And what causes gave rise to an *Austrägal* case in the first place? In most of the 54 cases (1815–1866), the territorial changes between 1795 and 1815 played a decisive role. Member states could not agree how to define the legal succession with respect to the obligations of the territory in question. Only two disputes originated from the time of the German Confederation. For example, in 1832 the states Hanover, Oldenburg, Braunschweig, Nassau as well as the free cities Bremen and Frankfurt brought an action against Kurhesse, which had – contrary to previous agreements (*Mitteldeutscher Handelsverein*) – entered into a customs union with Prussia. The *Austrägal* case was dealt with by the High Court in Vienna, but was not decided until 1866. The organisation of the German Customs Union in 1833 made the case obsolete. In 28 of the 54 cases, only two states were litigants; in one case, 15 states were involved. On average three to four states were involved in each case.[82]

Considering the dominance of disputes about territorial changes after 1795, it is understandable that most *Austrägal* cases were conducted by those German states that were deeply affected by these changes: Kurhesse (24 times party to a case), Prussia (24), Nassau (23), Bavaria (21), Hesse-Darmstadt (13) and Baden (11). Austria, on the other hand, the presiding and most powerful state of the German Confederation, was more hesitant to use the *Austrägal* jurisdiction. It was party to a case only four times, and of these cases, three were related to Austria as a successor state of territories along the River Rhine. While Bremen, Lübeck, Hamburg, Lichtenstein and Holstein-Lauenburg (having the King of Denmark as sovereign) were never involved in an *Austrägal* case, all other states were party to at least one.[83]

The matters in dispute were overwhelmingly of »modest constitutional relevance« or, as one legal historian put it, »politically not essential«. They concerned above all pension benefits, endowments, custom disputes, border conflicts, controversies over successions with regard to the states liquidated in or before 1815 or disputes over rights of inheritance. As the average duration of *Austrägal* proceedings of 11 years (5 years mediation attempts at the Federal Convention; six years court proceedings) indicates, the matters in dispute were often extremely complex and required masses of documents to be sent back and forth across Germany (in horse carriages). The longest court proceeding lasted 16 years; three cases were not terminated until 1866. In general, most cases (33) were brought before an *Austrägal* court between 1815 and 1830; after 1850 only nine new interstate disputes were referred to court.[84] It seems indeed that after the revolution 1848, the *Austrägal* jurisdiction was losing in practical relevance for the German governments to solve their disputes. Authors believing in the progress of (the Confederation's) law (civil servants among them) may still have hoped that someday (soon) there will be »a complete and definite regulation of the [Confederations'] dispute settlement«.[85] However, newly arisen debates in the Federal Convention about finally creating a *Bundesgericht* got bogged down until 1866.[86]

How was an *Austrägal* case conducted in a practical sense? Evidently, it is impossible here to summate 54 cases over a time span of 51 years beyond providing some statistics, such as those

81 Bönnemann (2007) 32 f.; cf. e. g. Thüringisches Hauptstaatsarchiv, Weimar (THStA) Eisenacher Archiv, Hoheitssachen 1431: 36–65 (39), Dr. Müller, Grundriß verschiedener Verteidigungsmomente, 8.6.1834; 92, Dr. Müller to Dr. Schweitzer, Staatsministerium, 24.6.1834.

82 Frühauf (1976) 160; Stein (1950) 61; cf. Betz (2007) 61, annex I (table of cases).

83 Stein (1950) 57 f., 60.

84 Bönnemann (2007) 54; Betz (2007) 56, 60; Frühauf (1976) 126.

85 Reichard (1844) 557.

86 SHStA 10718, Nr. 17 Entwurf des Vortrages des Bundestags-Ausschusses eines Bundesgerichtes, vorgelegt 23.1.1860, Dr. von Linde.

given above. It seems thus justified to point to a few archival impressions about the inception of one single *Austrägal* case in order to gain a notion of the legal questions under dispute and the language in which these were dealt with. This can help to better understand the everyday complexities of the *Austrägal* jurisdiction, while still acknowledging that the personnel of other cases may have had different experiences.

A conflict had been smouldered between Kurhesse and Saxon-Weimar-Eisenach since 1816. The conflict involved the sequestration of revenues connected with a religious donation (based in Fulda) that had properties in the Thuringian Grand Duchy. Kurhesse commenced the procedure in 1820 by petitioning the Federal Convention. Attempts at mediation were undertaken in Frankfurt. Their failure had to be officially conceded by the Federal Convention, and a statement was made that a formal *Austrägal* procedure was to be opened. Members of the Confederation (that is, their courts of third instance) were named as potential *Austrägal* judges, and the high court in Celle was chosen in mid-1832 by the parties. In July 1832, the Federal Convention informed the high court about its newest appointment as *Austrägal* court (its seventh appointment) to decide the dispute about the sequestrated revenues of the Fulda donation on Saxon-Weimar territory. Kurhesse as *Imploranten* »requested the reestablishment of the *status quo p. p. ut intus*«. In March 1833 the court asked the parties to each nominate an attorney from the *Prokuratoren* admitted in Celle. In November the attorney of Kurhesse, Bethe, provided the court with a 20-page legal analysis of the facts plus evidence »in attachment«. This memorandum explained the factual history of the liquidation and »dismemberment« (*Zerstückelung*) of the Grand Duchy of Frankfurt (1810–1813), including the »city and department of Fulda« by Prussia, Kurhesse, Saxon-Weimar and Bavaria (likewise sued by Kurhesse). Bethe also laid out a number of legal arguments mainly referring to the Vienna Congress Act (Articles 37 to 40) and the complaints of Kurhesse in the Federal Convention. Once the »State-Ministry« in Weimar was provided with this memorandum that confronted their government with a claim of compensation for lost profit, the councillors prepared files with counter-arguments to »instruct« Weimar's attorney – who was not yet chosen. The judges of the *Ober-Appellationsgericht* Jena (currently *Austrägal* judges in two parallel cases) were requested to submit an expert report. They remained involved and supported their government against Kurhesse throughout the proceedings. It was the Jena high court judge Dr. Ernst Müller who instructed Weimar's newly appointed attorney, the *Prokurator* Schwarz (chosen in March 1834) about the »points of defence« in the case.[87]

The high court in Celle, aware that the case had been going on now for more than a year (the deadline set to hand down the award in Article 3 no. 8 AO), pushed the Weimar government in April 1834 to provide it with its counter-memorandum by 26 May 1834. However, considering the cumbersome procurement of documents and, most of all, the postal connections between Weimar and Celle (not to mention Jena), this deadline was clearly not going to be met. Judge Dr. Müller, assigned to provide attorney Schwarz with the main arguments, complained »this is indeed impossible«.[88] The deadline was extended until June of the same year. In May, Schwarz sent a first draft of his memorandum to the councillors in Weimar for further discussion. He commenced with the self-confident statement that the »competence of the Federal Convention in the current issue … to mandate an *Austrägalinstanz* … is highly dubitable.« His »competency-question« led him to argue that »from a legal point of view this dispute does not involve members of the Confederation, but rights of persons, individual citizens, or certain donations …«. Next to the »incompetence of the *Austrägal* court«, Schwarz objected to the plaintiff's right to sue (*Aktiv-Legitimation*). »Religious and secular donations (*Stiftungen*) do not belong to the state property; according to Article 65 *Reichs-*

87 THStA Eisenacher Archiv, Hoheitssachen 1431: 1, 14, 19, Staatsministerium Weimar an Oberappellationsgerichtsrat Dr. Müller, Jena, 24.12. 1833, 25.3., 29.4.1834; on the role of the court in Jena as Thuringian arbitration tribunal cf. Klüber (1822) 248.

88 THStA Eisenacher Archiv, Hoheitssachen 1431: 10, Vollmacht, Dr. iur. Johann G. Behte, Celle 31.10.1834; 20, Schwarz to Staatministerium Weimar, 28.4.; Dr. Müller to Staatsministerium, 4.5.1834.

deputationshauptschluss [1803], they are to be conserved like any other private property. If revenues and interests … due to these donations were sequestered, only the directly affected private person is impaired, and only this person is authorised to ask for judicial intervention in the matter. The protection of the rights of its subjects afforded by any government does not entitle the latter to make their private affair a state affair (*Staats-Sache*), and to appoint oneself as party in the matter.« And finally, Schwarz argued factually by raising the rhetorical question: »How can the electoral [*kurfürstliche*] government justifiably characterise a procedure [the sequestration] as unlawful given that it itself apparently embraced and thus approved and considered it appropriate?« (Fulda belonged to Frankfurt until 1813, and parts of the Duchy of Frankfurt were incorporated into Kurhesse after 1815).[89]

After he read Schwarz's note, judge Müller also wrote a memorandum (60 pages) against the Kurhesse's case and attached 26 documents as proof of the righteousness of Saxon-Weimar's government. He devoted a great deal of attention to Schwarz's question about the *Austrägal* court's incompetence. He referred to the »fact« that the sequestrated objects were – in part – never matters of international treaties (*Staatsverträge*), and therefore they could not be the cause of an interstate dispute. The »Austrägal procedure in question is on no account justified and admissible (*begründet und zulässig*)«.[90] Later, Müller even quoted a recent precedent of one party's »objection to an incompetent [*Austrägal*] court« in the parallel procedure of Prussia against (among others) Saxon-Weimar about the obligations of repayment of loans by the *Preußische Seehandlung* company. In this case as well, the high court in Celle was in charge, and it required the opponents to explicitly respond in their memoranda to this objection.[91]

Schwarz and Müller's strategy did not bear fruit. In an advanced notice in late 1834, the *Austrägal* court declared »on behalf of the Federal Convention« that it neither recognised their objection of its »incompetence« nor the objection to the plaintiff's right to sue. The Kurhesse government had »sued [the other governments] in its capacity as the highest state authority by virtue of its sovereignty« and not as a mere »representative« of private interests (the Fulda donations).[92] While the case continued, we do not know anything about the court's internal debates and its communications; Celle's archives were lost in World War II.[93]

Indicating the depth of the legal argumentation, the few impressions of an *Austrägal* case we do have must suffice. In part, Saxon-Weimar released Fulda property in late 1835;[94] however, only in 1843 was the final award given by the high court in Celle, rejecting Kurhesse's claims and ordering the claimant to pay the costs.[95] It was quite common that the awards were carefully drafted, especially considering the facts and the laws in question.[96]

Once the award was given by an *Austrägal* court, it was, as mentioned above, final and binding. Further legal avenues were excluded – lest the parties could provide the same *Austrägal* court with new evidence within four years (*Restitution ex capite novorum*, Article 3 no. 9 AO). In the 1830s, the admission of plea in nullity (*Nichtigkeitsbeschwerde*) was debated, but no formal statute to that effect was ever stipulated by the Federal Convention. This (reform) debate might be read as yet another expression of the notion of perfectibility of the Confederation's law and its institutions. But, again, the concerns were too great that it all might end in one central federal court placed at the top of

89 THStA Eisenacher Archiv, Hoheitssachen 1431: 26, Staatsministerium Weimar to Dr. Müller, 16.5.1834; 27–34, Schwarz, Rechts-Gutachten, Celle, 30.4.1834.

90 THStA Eisenacher Archiv, Hoheitssachen 1431: 36–65 (39), Dr. Müller, Grundriß verschiedener Verteidigungsmomente, 8.6.1834; 92, Dr. Müller to Dr. Schweitzer, Staatsministerium, 24.6.1834.

91 THStA Eisenacher Archiv, Hoheitssachen 1431: 75, Schwarz to Staats-Ministerium, 15.6.1834.

92 THStA Eisenacher Archiv, Hoheitssachen 1431: 102, Prot. Bundesversammlung, 1. Sitzg. 3.1.1835 §: 3.

93 Frühauf (1976) 4.

94 THStA Eisenacher Archiv, Hoheitssachen 1431: 107, Rescript Carl Friedrich, Weimar, 11.12.1835; 119, Carl Friedrich, 17.3.1837.

95 THStA Eisenacher Archiv, Hoheitssachen 1431: 127, Decret Oberapl. gericht Celle, 10.10.1836; Beischeid, 14.3.1837; Betz (2007) Tabellarische Übersicht I, No. 30.

96 Bönnemann (2007) 30.

a court hierarchy, thereby relegating state courts to the second rank: an idea not compatible with state sovereignty. Thus, the rules set-up on the *Austrägal* procedure following the Congress of Vienna continued to remain more or less unaltered.[97]

8 *Austrägal* Jurisdiction and War. The Austro-Prussian Dispute 1866

It seems noteworthy that in all *Austrägal* cases, the governments ›defeated‹ in the procedure accepted the award without delay, as required in Article 11 Federal Act. This is all the more remarkable because there were occasions when larger powers stood against small states in an *Austrägal* procedure. The question whether the former avoided using their political influence to put pressure on their smaller adversaries before and during the procedure cannot be answered here (if at all – for this depends on the available sources). However, even Prussia's government, once it could not convince the Federal Convention of its opinion that certain disputes putting political questions in the forefront were not justiciable, accepted the majority's viewpoint as obligatory[98] – as long as the subjects under dispute were not considered vital. The *Austrägal* courts successfully solved the legal questions put before them. In this respect, contemporaries understandably emphasised »how important and beneficial for Germany's internal peace (*Ruhe*) [the provision of] Article 11 of the Federal Act« was.[99]

The limits of the concept of *Austrägal* jurisdiction were reached when legal questions and political interests intersected. Prussia's two rather minor disputes during the 1820s and 30s, when it invoked a self-declared, but poorly explained »political question« doctrine, pointed towards the underlying challenge that the execution of legal decisions depended on good will – most of all on the good will of the stronger party. Disputes with Anhalt-Köthen about transit taxes may have involved political questions, but did not call into question the *Austrägal* jurisdiction or the German Confederation in its entirety.

The connection between the federal judiciary, as represented by the *Austrägal* jurisdiction, and federal (military) intervention was not only evident in the respective laws enacted since 1817 but most of all in the Vienna Final Act (WSA), which united in one text the application of law and the application of force. Also the political situation in several German states since the 1850s reminded observers that there were in fact political questions and disputes that the parties were unwilling to settle by law and, therefore, (military) force was decisive. In 1850, during the constitutional conflict and the federal intervention in Kurhesse (disputable according to the provisions of the Vienna Final Act), at one point, Bavarian and Austrian troops fired at Prussian troops (skirmish at Bronnzell). In 1866 the Austrian-Prussian conflict escalated even further. Legally speaking, the basic laws of the German Confederation stood at the heart of the dispute about the territories of Schleswig and Holstein, jointly administered by both powers. Prussia's Chancellor, Otto von Bismarck, made clear that his government did not attach great value to the »federal bond«, and that he saw Prussia's relations with Austria no differently than with any other European power. Prussia and Austria never had a dispute settled by *Austrägal* procedure. And Bismarck had no intention of putting the political question of Schleswig and Holstein before the Federal Convention, with the aim to ask an *Austrägal* court to decide the matter. He saw the question purely in terms of international law and Prussia's *ius ad bellum*. The Austrian government, on the other hand, insisted on the obligatory nature of the »permanent« (*beständig*) Confederation (Article 1 Federal Act, 1815) and wanted to solve the matter according to its legal provisions for federal dispute settlement. The subsequent debates in the Federal Convention centred on the applicability of the summary *Austrägal* procedure

97 THStA A 8048: 1–10, Report on admission of *Nichtigkeitsbeschwerde* in Austrägal procedures, Oberappellationsgericht Jena to Duke Saxon-Coburg-Gotha, 16.10.1834 [recommending not to add to the Restitution *ex capite novorum*]; Frühauf (1976) 129; Bönnemann (2007) 29.

98 Frühauf (1976) 160.

99 Reichard (1844) 556; cf. Zoepfl (1863) 456 f. characterising the German Confederation as a »Landfriedens-Verbindung der deutschen Partikularstaaten« and praising the *Austrägal* procedure's contribution to the maintenance of peace in Germany.

(Articles 18–20 WSA) against Prussia. On June 11th, 1866, Austria petitioned the Federal Convention to decree the mobilisation of the federal armed forces against Prussia. While Prussia had violated two treaties with Austria, this action was taken primarily because its military advancement in Holstein was a form of »self-help«. Thereby, the matter of fact of Article 19 WSA was fulfilled and the Federal Convention was called to put an end to Prussian self-help. From now on, only immediate military measures of the Confederation could defend the »domestic security« of the German Confederation and the rights of its members. Austria convinced the majority of the Federal Convention. In accordance with Article 19 WSA, a federal execution (*Bundes-Execution*) against Prussia was agreed upon. With this petition, the legal dispute soon turned into an armed struggle for dominance in Germany. Following the Confederation's defeat at the hands of Prussia in the »Seven Weeks' War«, on August 23, 1866, the peace treaty of Prague terminated the German Confederation – and in doing so *Austrägal* jurisdiction was relegated to history.[100]

9 *Austrägal* Jurisdiction as Anachronism. The Lippe Succession Dispute and Paul Laband's *Reichs-Austrägalinstanz*

Germany's new constitutional order, following the unification process in 1870/71, saw the sovereignty of the 25 German states legally and factually shrinking in relation to a stronger central power under the King of Prussia, who was in personal union with the German Emperor (an American observer spoke more soberly of the Prussian King's »hereditary presidency«). Even though the German states and their princes (forming in sum the German Empire as a sovereign state and subject of international law) retained their formal sovereignty, the Empire's constitution enumerated essential rights and powers (such as the declaration of war) as being reserved for the central power – the *Reich*.[101] A number of German states maintained their Foreign Offices and diplomatic representations in the capitals of Europe, most of all their envoys in Berlin. The question of the conclusion of international treaties remained challenging for the new central authority in Berlin, as the state administrations enviously guarded sovereign state ›rights‹. For example, such disputes arose when those German states bordering foreign states continued to negotiate their own railway treaties or treaties about the exact border delimitations.[102] Constitutional disputes were referred to mediation by the Federal Council (*Bundesrat*, the ›first chamber‹ formed by the German princes or their envoys). The *Reichsgericht*, set-up in 1877 as Germany's central high court, was authorised only to hear cases in civil or criminal matters. Disputes between member states were to be mediated by the *Bundesrat* (Article 76 *Reichs* Constitution 1871). Private individuals had no recourse in constitutional matters. Whereas the special *Austrägal* procedure, according to Article 30 WSA, had opened at least a small window in that direction, the constitution of 1871 merely copied the provision of Article 29 WSA concerning the right of the *Bundesrat* to step-in on behalf of individuals against obstructions of justice in any member state.[103]

Disputes between different German states (their administrations or their princes as heads of the ruling houses) were unavoidable. In particular, the

100 Huber (1953/4) 47–56; cf. Betz (2007) 61.

101 The editor in charge of Germany in the Comparative Law Bureau of the ABA, Robert P. Shick, described the form of government and distribution of power in Imperial Germany most unenthusiastically: »The German Empire is a federal state composed of [25 states], these lands being united in a great ›corporation of public law‹ under the hereditary presidency of the King of Prussia. Its Emperor is its president, not its monarch. It is an extension of the North German Bund of July 1, 1867, and the Imperial Constitution of 1871 is the Federal Constitution revised. The Imperial Constitution rests upon the will of the Empire. Sovereignty does not reside in the Emperor, but in the allied powers«. Shick (1909) 60. Contemporary English translations of the German Constitution of 1871 are available in: Dodd (1909) 325–351 and Howard (1906) 403–435. Cf. Kraus (2015) 228 f.; 232.

102 SHStA 1034, MAA Nr. 16.a.1: 6, Held to Saxon MFA, 29.5.; 12, Pfretzschner to MFA, 28.2.1879.

103 Article 77 RV (1871) »Wenn in einem Bundesstaate der Fall einer Justizverweigerung eintritt, und auf gesetzlichen Wegen ausreichende Hülfe nicht erlangt werden kann, so liegt dem Bundesrathe ob, erwiesene, nach der Verfassung und den bestehenden Gesetzen des betreffenden Bundesstaates zu beurtheilende Beschwerde über verweigerte oder gehemmte Rechtspflege anzunehmen, und darauf die gerichtliche Hülfe bei der Bundesregierung, die zu der Beschwerde Anlaß gegeben hat, zu bewirken.«

rules of succession to the throne (*Thronfolge*) in a number of German states led to fierce disputes between different ruling houses and the branch lines. The parties vehemently argued against their opposing houses or branches of other ruling families eager to secure the throne for themselves. Advocates of the monarchic system were concerned about these ›insults‹ uttered against monarchs, which would damage the reputation of the monarchy in general and Germany's constitutional system.

Starting in 1890, one of the smallest German states, the *Fürstentum* Lippe (Detmold) became the scene of one of the fiercest of these disputes. The capability of the *Bundesrat* to settle such quarrels amicably was the subject of doubt from different political angles. The German and international press reported widely on the succession dispute, the opposing parties and their different legal arguments; moreover, questions were asked in parliament. The history and the legal intricacies of the *Lippesche Erbfolgestreit* have been analysed elsewhere; hopefully, it will suffice here to name but the most elementary facts and a few of the protagonists.[104]

Following the death of Prince Woldemar of Lippe in 1895, the ruling family of Lippe-Detmold had (legally) died out. Woldemar had no children and his brother Karl Alexander had been incapacitated [*entmündigt*] due to mental illness. Aware of the situation that would ensue following his demise, in 1890 Prince Woldemar concluded a secret treaty with the Schaumburg-Lippe family (a side line of the house of Lippe) declaring its head, Prince Adolf of Schaumburg-Lippe, a brother-in-law of Emperor Wilhelm II, to be his successor in Lippe. In April 1895, Prince Adolf was duly appointed regent of Lippe in place of the incapacitated Karl Alexander, who was now nominally sovereign of the Principality of Lippe. However, two other – in part older – branch lines of the House of Lippe, Lippe-Biesterfeld and Lippe-Weißenfeld, also made claims to the regency.

The legal dispute concerning the regency of Lippe – which was previously just a mere academic exercise – was now actually being pursued in earnest. Pointing to Lippe's »house laws«, the Lippe-Biesterfeld family, headed by Count Ernest, argued that he would be first in the line of succession following the extinction of the Lippe-Detmold line. (In this respect, it is relevant that, decades earlier, even the question of the primogeniture as the guiding principle of the law of succession of the Principality of Lippe was disputed between Lippe-Detmold and Schaumburg-Lippe. It was decided in the affirmative by an *Austrägal* court in 1838.[105]) The Schaumburg-Lippe family, on the other hand, argued that the paternal grandmother of Ernest of Lippe-Biesterfeld, Modeste von Unruh, was of lower nobility: her status as baroness (*Freifrau*) was disputed. According to the House Laws of Lippe, wives of members of the House of Lippe had to be »equal« (*ebenbürtig* to their husbands) in order to make legitimate progeny of the marriage eligible to succeed. Progeny born of non-equal marriages were thus excluded from the succession. However, Prince Woldemar's attempts (starting in 1890) to decree just such a reading of the law – which would have favoured the Schaumburg-Lippe line – failed; not even Emperor Wilhelm II's public intervention on behalf of his brother-in-law was sufficient to force the Diet of the Principality to accept Adolf of Schaumburg-Lippe's regency as binding and legitimate. Instead, after the involvement of the *Bundesrat* (Article 76 of the *Reich* Constitution) and the Federal Chancellor Hohenlohe-Schillingsfürst, the disputing parties agreed in 1896 to a treaty (*Schiedsvertrag*) referring the dispute about the regency to an arbitration tribunal headed by King Albert of Saxony. While this was a step also acceptable to the Lippe Diet, it seriously angered Emperor William, who considered himself the ›natural‹ arbitrator of the *Reich*.[106]

In their 50-page award of 22 June 1897 King Albert together with the President of the *Reichsgericht* Otto von Oehlschläger and five *Reichsgericht* Justices admitted: »In the *ius commune* there is barely a doctrine that is as contested and, in particular by the publicists of the previous century,

104 Bartels-Ishikawa (1995); Fehrenbach (1968) 337–355 (339) summarises: »Es ging um den Souveränitätsanspruch eines Bundesstaats, die Erbfolge ohne Einwirkung des Reichs zu regeln«.

105 Bornhak (1890) 384 referring to Leonhardi; award of Badisches Oberhofgericht 22 December 1838.

106 Fehrenbach (1968) 343 referring to the Memoirs of Chancellor Hohenlohe; Bartels-Ishikawa (1995) 30.

as often discussed as the doctrine of equality (*Ebenbürtigkeit*).«[107] However, after a long historical elucidation and argument about the plausibility of the sources available, the arbitrators accepted the »equality« of Modeste von Unruh, and they concluded that her grandson Count Ernest of Lippe-Biesterfeld was »entitled and competent« (*berechtigt und berufen*) to succeed Prince Karl Alexander of Lippe – and thus to take over the regency until the Prince's death.[108] Much to the chagrin of Emperor William II, Count Ernest then took over the regency from the resigning Prince Adolf of Schaumburg-Lippe. However, Ernest never became Prince of Lippe. He remained regent throughout his life since the incapacitated Prince Karl Alexander outlived him by one year and died in 1905. Ernest's son, Leopold, was finally enthroned as Prince Leopold IV of Lippe, but not before another arbitration award about his »equality« was rendered against the claims made by Prince Adolf of Schaumburg-Lippe.[109]

Early on, the parties involved drew on legal expertise to substantiate their claims to the regency of Lippe. A number of German law professors of some fame, like Wilhelm Kahl, Conrad Bornhak and, most of all, Paul Laband, professor of constitutional law in Straßburg and author of the leading treatise on the issue, wrote long memoranda on Lippe's law of dynastic succession and the claims of the lines of Lippe-Biesterfeld and Schaumburg-Lippe. These memoranda went into great historical, legal and dynastic details and were, in particular once they replied to opposing statements, riddled with spiteful remarks.[110] In March 1896, – thus still before the parties had agreed to refer their dispute to arbitration – Laband supported Schaumburg-Lippe's argumentation by declaring categorically in his second memorandum on the issue that according to the Lippe »house-law« the descendants of the Biesterfelder and Weißenfelder line »bowed out« (*ausscheiden*) of the succession to the Lippe throne since their forefathers had married non-»equal« (*ebenbürtig*). Therefore, the incumbent regent Prince of Schaumburg-Lippe was »of god's grace« the legitimate heir on the throne and should remain in power.[111]

Evidently, Laband, Imperial Germany's »grandmaster« of constitutional law,[112] was unsatisfied with the reasoning of the Supreme Court Justices in their arbitration award on the Lippe dispute one year later; and in this, he had the most prominent intercessor possible: the Emperor. William II was angered about the questionable succession to the throne and the resulting disputes. He considered the entire discussion a threat to the »monarchical principle«, but most of all he regretted that his brother-in-law had not been awarded the Lippe throne. Following the (disappointing) arbitration award of June 1897, he asked Laband, whose opinion in favour of the Schaumburg-Lippe line was by now just as well-known as was his »fidelity to the Empire and Prussia«,[113] for legal advice. Laband provided his sovereign with a creative – and rather conservative – solution to the underlying problem.

Disputes between the German princes, Laband argued, should be settled exclusively amongst themselves. He characterised this *Fürstengericht* as

107 Schiedsspruch (1897) 10. »Im gemeinen Rechte giebt es wohl kaum eine Lehre, die so bestritten und, namentlich von den Publizisten des vorigen Jahrhunderts so viel erörtert ist, wie die Lehre von der Ebenbürtigkeit. Der Hauptstreit in dieser Lehre dreht sich im gemeinen Rechte darum, ob die von Mitgliedern des hohen Adels mit Frauen des niederen Adels eingegangenen Ehen ebenbürtig sind, die aus ihnen entsprossenen Kinder zur Familie des hochadligen Vaters gehören. Darüber wird auch im vorliegenden Falle gestritten.«

108 Schiedsspruch (1897) 10.

109 Schiedsspruch (1906); Bartels-Ishikawa (1995) 35 considers both awards as »in their way an *Austrägal* award [seiner Art nach ein Austrägalurteil].«

110 Laband (1896) 11 »Wenn [Wilhelm] Kahl einst seine großen Werke über Staatsrecht veröffentlichen wird, werden sie vermutlich einen neuen Aufschluß bringen über das Recht ›welches es nicht giebt‹.«; cf. Kahl (1896); much to the embitterment of Laband, in 1894 Kahl had been appointed to the chair of public law at the university of Berlin – a post Laband had himself hoped to receive, cf. Mussgnug (2014) 10 f.

111 Laband (1896) 47; cf. Laband (1918) 80; 106 retrospectively downplaying the pertinence of the dispute: »The matter in itself (Die Sache selbst) … was irrelevant (ohne Belang)«; he saw the »agitation« (wüste Hetze) against Prince Adolf as targeting the Emperor.

112 Mussgnug (2014) 3.

113 Mussgnug (2014) 5 speaks of Laband's »stramm reichstreu-preußisches Reden und Agieren«; cf. Wehler (2006) 1014; 1370 FN 39 on Labands »analytische Brillanz zur Reichsverfassung«; Kraus (2015) 233.

a permanent and central *Reichs-Austrägalinstanz* – a special court for German princes by German princes. In November 1897, Emperor William, who had been repeatedly urged to step in by the rulers of Baden, Oldenburg and Schaumburg-Lippe in order to find a ›monarchic‹ solution (as opposed to the legalistic and ›democratic‹ way pursued by the Diet of Lippe and the King of Saxony) to the Lippe *Thronfolge* dispute, sent Laband's memorandum to all of the German princes. It was merely transformed into a private letter, commencing with the greeting, »My Dear Cousin!«. The letter laid out the question of a Princely Court to arbitrate such disputes and explained the gap in the German legal order: There was no institution to solve disputes regarding the monarchical succession in the German states. Despite the seemingly clear *primogenitur*, disputes still arose: concerning the question of equal birth of individuals as future spouses of a prince or about legal titles to territories located in different German states. The Emperor, therefore, argued: »Anyone wanting to become a member of the illustrious circle [of the German monarchs], must be welcomed and recognized by the German princes themselves. Succession disputes [*Thronfolgestreitigkeiten*] cannot be settled by civil courts [*bürgerliche Gerichte*] …. The Throne cannot be claimed like an estate and cannot be adjudged or denied according to the rules of procedure«. In its conclusion, the letter apodictically stated: »Neither a judgement by civil servants nor a plebiscite in whatever form, but a verdict [*Wahrspruch*] of the German princes shall decide who should be a German ruler and comrade in rank and entitlements [*Standes- und Rechtsgenosse*] of the German Sovereigns«.[114]

However, Paul Laband did not foresee the anger his thinly veiled critique of the *Reichsgericht* Justices who – based on «civil« rules of procedure – arrogated to »decide who should be a German ruler«, would cause among Germany's princes; and neither did his principal William II, who made no secret out of the fact that he had never welcomed Count Ernest in »the illustrious circle« of the German monarchs (he sent Adolf a ›farewell‹ telegram, but no ›welcoming‹ telegram to Ernest). But phrases like, »It contradicts the interests of the *Reich* that such questions [of succession] will be decided and the Emperor has no influence on it to protect – if necessary – the interests of the *Reich*«, refuted the notion of the Emperor in Berlin as a *primus inter pares* so cherished in Germany's provincial capitals.[115] The proposed *Reichs-Austrägalinstanz* would have been composed of three princes, appointed by each party, and headed by the Emperor. These seven German princes were supposed to decide on the matter themselves and were not permitted to delegate it (as King Albert of Saxony did in 1896) to their respective councillors or judges. Already in his second memorandum on the Lippe dispute one year earlier, Laband had stated an existing »common sense of justice«[116] [*gemeinsames Rechtsbewußtsein*] of the German dynasties that he now wanted to put to good use: »decisive for the verdict [of the *Fürstengericht*] shall be the sense of justice [*Rechtsbewußtsein*] of the German princes, not legal scholarship [*juristische Schulgelehrtheit*]«. The Emperor considered it unnecessary to submit the proposed compact to the provincial Diets; rather, the princes were supposed to sign »as heads of their families according to the *Hausgesetze*«. Constitutional validity of the *Austrägalgericht*, according to the legislative process, was considered superfluous.[117]

King Albert clearly recognised the critique aimed at the arbitration tribunal that he had presided over just months earlier and thus felt seriously offended by William's proposition. Speaking in Berlin to the Envoy of Saxony, Imperial Chancellor Hohenlohe emphasised that he was not involved in this project of *Reichs-Austrägalinstanz*. Hohenlohe coolly characterised the Emperor's idea

114 SHStA 1035, MAA Nr. 3c: 8, William II to King of Saxony, 20.11.1897; Grundzüge für die Bildung eines Fürstengerichts; cf. Fehrenbach (1968) 345; Bartels-Ishikawa (1995) 33 FN 148 »cannot confirm« the authorship of Laband – because she could not find the sources mentioned by Fehrenbach; however, given the documents in the Saxon archives (Fehrenbach worked with Bavarian sources) there cannot be any doubt that Laband was the author.

115 Fehrenbach (1968) 337 referring to Laband, Reichsstaatsrecht 1919: 58.

116 Laband (1896) 9; Laband was gratified by the fact that his legal opinion was sought after; the Lippe memorandum was probably his »best-known«, Mussgnug (2014) 12.

117 SHStA 1035, MAA Nr. 3c: 8, William II to King of Saxony, 20.11.1897; Grundzüge für die Bildung eines Fürstengerichts; »maßgebend soll bei der Fällung des Spruchs das im deutschen Fürstenstande lebendige Rechtsbewußtsein und Rechtsgefühl sein, nicht juristische Schulgelehrtheit«, on succession to the throne disputes cf. Bönnemann (2007) 101–110.

as a »private, not a government action« (*Regierungshandlung*) and more or less put the blame on Laband. Hohenlohe, who was a relative of Count Ernest of Lippe-Biesterfeld and who was thus at odds with the Emperor about the Lippe dispute, »could not understand why this respected scholar« wrote such an »inferior work«. »Due to his profession, Mr. Laband is required to know that many German princes, in particular the more important ones, are hindered by their constitutions to join the agreement as wished by the Emperor.« Hohenlohe referred to Bavaria (where he had been prime minister, 1866–1870), and added that the Bavarian »government will reject foreign interference in the succession to the throne *a limine*«. Even the Imperial Foreign Secretary von Bülow jokingly questioned »whether the ›King of Prussia‹ will be able to do as the ›Kaiser‹ wishes«? (referring to Article 57 Prussian Constitution 1850].[118]

The reactions of the German princes were thoroughly divided. Some welcomed the idea of the *Reichs-Austrägalinstanz*, others, such as the Regent of Bavaria, asked for more time to deliberate the idea. The Duke of Saxony-Meiningen utterly rejected the proposal of his mighty »cousin«, reminding him that questions of succession to the throne were within the exclusive constitutional realm of the individual German states (*Einzelstaaten*). No infringement by the Emperor or other *Einzelstaaten* could be tolerated. The King of Saxony also foresaw constitutional hindrances that »prevented [him] from pursuing the plan«. The King of Württemberg responded in a long letter that it was impossible under the constitution to exclude the provincial Diet from questions of succession. The Diet could not be forced to accept the arbitration by a princely court to which it had never agreed. And Württemberg's parliamentarians were probably not inclined to leave the decision on important domestic disputes to German princes. Thus, the competences and legal basis of the *Fürstengericht* seemed very doubtful to him.[119] Finally, the Regent of Bavaria rejected the proposal as well. He pointed out that under the Imperial constitution, the Federal Council should be considered the competent institution to decide matters of succession and admittance of new members (*Zulassung neuer Mitglieder*). In their correspondence to one another, the ministers were more blunt in their assessment of the Emperor's proposal: the Diets in southern Germany would never accept such a dominant status of the Emperor (after all, he was the King of Prussia) as arbitrator, and public opinion would consider a concession in this respect »as a disgrace«. The Thuringian Envoy, von Reitzenstein, summarised the proposal by reminding his government that the Emperor would »principally« (*grundsätzlich*) be the head of the tribunal, and, considering the current situation, his opinion would always prevail. However, this »opened the risk of arbitrary awards« (*willkürliche Urteilssprüche*). While the Emperor wanted to ensure that he would have a (final) say in all German Throne succession disputes and aimed at excluding the Diets from any involvement in »purely dynastic affairs«, the German rulers were eager to underline their sovereignty and equal standing with the King of Prussia. As historian Elisabeth Fehrenbach has emphasised, the dispute made evident how unifying tendencies of the Emperor stood at odds with the particular interests of the *Reichsfürsten* – irrespective of the fact that both formed a (more or less) united front against the claims of parliamentarians to have a say in dynastic affairs.[120] In the end Laband's project came to naught; the princely *Austrägal* court was never installed. The term *Austrägal* as used by Laband and the Emperor pretended to quote an ancient German tradition. But there was no genuine belief in Laband's assumption that the princely »sense of justice« would be more advantageous to the German monarchies than a »judgement by civil servants«. Other German princes used their domestic constitutional obligations as a shield against further centralising

118 SHStA 1035, MAA Nr. 3c: 4, Sax. Envoy Berlin to MAA, 8.12.1897.

119 SHStA 1035, MAA Nr. 3c: 12; 19, 31, Saxon Envoy Berlin to MAA, 14.12.1897; 21., 29.1.1898.

120 SHStA 1035, MAA Nr. 3c: 25, Nostiz, Munich to Metzsch, Dresden, 24.1.1898; 34, Reitzenstein, Weimar, 7.7.1898; Fehrenbach (1968) 342; 346; 353.

encroachments by the King of Prussia and German Emperor.

The last vestiges of *Austrägal* jurisdiction in the German *Reich* were still visible in the introductory law to the court constitution act. § 7 *Einführungsgesetz zum Gerichtsverfassungsgesetz* (1877) confirmed that special courts among noble peers in criminal matters remained in force as stipulated by state law. In Prussia, these laws concerning the nobility's *Recht auf Austräge in Strafsachen* dated back to 1820 and 1854. The revolution of 1918 finally put an end to special courts for different ranks of society. The Weimar Republic saw disputes between the *Reich*'s member states or between states and the *Reich* as to be decided by the *Reichsgericht*. But that is another story.

■

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